Supreme Court, U.S.
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CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

EVA HARPER, Petitioner vs. R. DEAN HARMAN and LYNN HARMAN aka LYNN MEID, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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65 pp

QUESTIONS PRESENTED FOR REVIEW

1. When a judgment was filed on February 27, 1992 awarding actual and punitive damages which was "corrected" on May 18, 1992 "by order pursuant to Federal Rule of Civil Procedure 60(a)" reducing the punitive damage award by $36,778.18, what constitutes the judgment for purposes of the running of time for appeal? Is there only one judgment, or are there two? If only one, which one is the "the judgment" for purposes of appeal?

2. Where a motion to reconsider and correct the judgment is made two (2) days late and therefore is untimely, may the court grant the same relief sought by the Rule 59(e) motion under Rule 60(a) or 60(b) where justice requires? Is Rule 60 really a "reservoir of equitable powers" or is it limited by Rule 59?"

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OPINIONS DELIVERED IN THE CASE:

The AMENDED JUDGMENT AFTER REMAND of the U.S. District Court, Northern District of California, Appendix Exhibit "A", was filed on February 27, 1992. It was modified by the Court's ORDER CORRECTING JUDGMENT ENTERED 02/27/92; DENYING MOTION FOR RELIEF FROM JUDGMENT; DENYING MOTION TO AMEND JUDGMENT, Appendix Exhibit "B", filed May 18, 1992. A NOTICE OF APPEAL to the Ninth Circuit Court of Appeals, Appendix Exhibit "C", was filed on June 17, 1992. The Opinion of the Ninth Circuit Court of Appeals, Appendix Exhibit "D", dismissing the appeal as untimely, was filed November 1, 1993. Appellate/Petitioner filed a petition for rehearing on November 15, 1993. The Ninth Circuit Court of Appeals' order denying the petition for rehearing, Appendix Exhibit "E", was filed on February 28, 1994.

JURISDICTION

28 USC 1254(1) confers on this court jurisdiction to review the judgment in question by Writ of Certiorari. The date of entry of the Opinion of the Court of Appeals sought to be reviewed is November 1, 1993. That court denied a rehearing by order filed February 28, 1994. This petition is filed within 90 days, as required by Rule 13.

STATUTES INVOLVED IN THE CASE:

Federal Rules of Civil Procedure § 59(e). New trial; amendment of judgments:

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rules of Civil Procedure Rule 60. Relief from Judgment or Order:

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram bovis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This action for damages for alleged securities and common law fraud in connection with six (6) real estate transactions was tried in the District Court before the Honorable ROBERT AGUILAR. After a 17 day bench trial the court gave judgment against both defendants, EVA and BRAINARD HARPER, husband and wife, in the amount of $358,476.10 as actual damages, $300,000.00 in punitive damages (without requiring any evidence of the wealth of defendants) and $126,956.00 in attorney's fees. Defendants appealed pursuant to 28 USC 1291. The court of appeal reversed the judgment. It dismissed the action against BRAINARD HARPER. It held that the transactions did not fall within the provisions of federal or state securities laws, that no evidence supported the claims arising from two of the transactions and that there was no basis for an award of attorneys fees. As to the remaining defendant, EVA

HARPER, the court remanded with instructions to apply the "out of pocket loss" measure of damages rather than the "benefit of the bargain" measure and then recalculate the remaining awards of punitive damages in light of the result of the recalculation of compensatory damages.

On remand, the case was reassigned to the Honorable SPENCER WILLIAMS because Judge AGUILAR was not available. This was Judge WILLIAMS' first exposure to the case. Based upon briefs of the parties and without taking any new evidence, the court entered an amended judgment of February 27, 1992 (see Appendix, Exhibit A), by which actual damages were reduced by 80% to $71,494.64. In recalculating the punitive damage award, the trial court, following the mandate from the Court of Appeal, reduced the punitive damage award in favor of plaintiff DEAN HARMAN in direct proportion to the amount of the reduction of the actual damage award, but

failed to reduce proportionately the punitive damage award in favor of plaintiff LYNN HARMAN (which made a $36,778.18 difference).

Defendant filed a Rule 59(e) motion to amend the judgment. Defendant asked the court not only to correct the punitive damage award, but to reverse all awards of punitive damages, on the basis that there was no evidence at trial of the wealth, or lack thereof, of EVA HARPER, and to reverse the damage awards in two (2) of the three (3) transactions because of the failure to apply the out of pocket loss rule.

For reasons to be discussed, defendant's motion to amend was filed two court days late. When plaintiffs opposed defendant's motion on the basis that it was not timely filed, defendant filed a motion for the same relief under Rule 60(b). Alternatively, defendant asked the court to correct the errors in the judgment under the Rule 60(a).

The trial court denied defendant's motion under Rule 60(b), but granted it in part under 60(a), entering its ORDER CORRECTING JUDGMENT ENTERED ON 2/27/92; DENYING MOTION FOR RELIEF FROM JUDGMENT; DENYING MOTION TO AMEND JUDGMENT. (See Appendix, Exhibit B.) The court reduced the punitive damage award by $36,778.18 to correct "an oversight on the part of the court". The order stated:

> Accordingly, the Clerk of Court is hereby instructed to correct the judgment entered on February 27, 1992 awarding $100,000.00 in punitive damages to LYNN HARMAN $100,000.00. [sic] The punitive damage award to LYNN HARMAN shall now be entered as $63,221.82.

As to defendant's other requested amendments, the court stated "the court does not think excusable neglect under Rule 60(b)(1) was intended to include events which affect only the date a Rule 59(e) motion is filed, as opposed to a more substantive issue."

Defendant filed her appeal on June 17, 1992, within 30 days from the order in which the court amended the judgment. (See Appendix, Exhibit C.)

Plaintiffs made a motion to dismiss the appeal on the grounds that the final judgment was entered on February 27, not on May 18. On November 1, 1993, the Ninth Circuit Court of Appeals filed its opinion affirming the District Court's order amending the remand judgment pursuant to Rule 60(a) and denying appellate's motion for Rule 60(b) relief, and dismissed appellate's appeal of the "underlying judgment". (See Appendix, Exhibit D.) Defendant's motion for rehearing was denied on February 28,1994.(See Appendix, Exhibit E.)

The reason that Defendant's Rule 59 motion was late filed was that, the night before the day her attorney had set aside to prepare the motion (five days before the deadline), his father in law unexpectedly

died. He flew to Colorado Springs the next morning with his wife to be with her mother and take care of their affairs. In the rush, he inadvertently left behind the file he had taken home to prepare the motion. Upon his hurried departure, he called his secretary to inform her he was leaving for Colorado Springs and asked her to check his calendar to let him know of any deadlines. Because of the emotional circumstances and the urgency and complexity of affairs in Colorado Springs, he was unable to return until Saturday, March 14, 1992, and was unable to attend to his law business during that time. Mr. MATTHEWS forgot the deadline for filing the motion to amend the judgment, but called his secretary on Thursday, March 12, to ask her to check it. She phoned back and told him that she had been unable to find the file (which was at Mr. MATTHEWS' home). Upon his return home that weekend, he prepared the motion which was served the

following Monday, March 16, 1992 -- two (2) court days late. (See Mr. Matthews' Declaration, Appendix Exhibit "F".)

ARGUMENT

I. THE SUPREME COURT NEEDS TO ESTABLISH A STANDARD AS TO WHEN A JUDGMENT IS A JUDGMENT FOR PURPOSES OF RUNNING OF THE TIME FOR APPEAL. THE RESOLUTION OF THIS REOCCURRING ISSUE SHOULD SEEK TO PROVIDE CERTAINTY AND AVOID, TO THE EXTENT PRACTICABLE, MISUNDERSTANDING OF LITIGANTS, WITH THE GOAL OF ACHIEVING RESOLUTION OF CASES ON THE MERITS.

As stated in Wright and Miller,[1] Rule 58 was intended to resolve "the old, old question of when is a judgment a judgment." As the author notes, it is of great importance to know precisely what the judgment is and when it was entered, since the time of appeal runs from the entry of judgment. An appeal noticed prior to the entry of judgment will be dismissed as premature.

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[1] Wright and Miller, Federal Practice and Procedure: Civil §2781

Because so much of consequence turns on the entry of judgment, Rule 58 was completely re-written in 1963 to attempt to eliminate the uncertainty as to whether and when a judgment has been rendered and entered. Unfortunately, it did not eliminate the uncertainty, because it deals only with ministerial considerations and not with issues that arise when an initial judgment is changed.

Rule 58 requires two distinct acts to coincide before there is an effective judgment. Every judgment must be (1) "set forth on a separate document"[2] and must be

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[2]The District Court clerk did not prepare a separate amended judgment; he merely entered the court's order. No appeal can be taken from a purported "judgment" that is not on a separate document. State National Bank of El Paso v. United States, 488 F.2d 890 (CA 5th 1974); Forstner Chain Corp., 177 F.2d 572 (CA 1st 1949). However, the parties can waive the separate judgment requirement. Wikoff v. Vanderveld, 897 F 2d 232 (CA 7th 1990). See also Frank Rosenberg, Inc., v. Tazewell County, 882 F 2d 1165 (CA 7th 1989), cert. denied 110 S.Ct. 726, 943 U.S. 1023, 7 L.Ed 2d 745. [The appellee did not object to the appellant taking the appeal

(2) "entered as provided in Rule 79(a)."[3] The rule states: "A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

Rule 58 is designed to avoid the uncertainty that is otherwise presented in a case like this. The court made a mistake; the judgment it entered is not what the court intended to enter. The court in essence ruled, by its later order, that "what is written down is not my judgment. I order the clerk to write something else down." Thereupon the clerk should have entered an amended judgment to make clear what the judgment was and when the correct judgment was entered, so that issues such as the time for appeal could be easily discerned.

The trial court sought to avoid reactivating the time for appeal by

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in the absence of a separate judgment form.]

[3]Rule 79 requires all judgments and orders to be entered in the docket.

characterizing the change of $36.778.18 as a "correction" under Rule 60(a) rather than an "amendment" under Rule 60(b): "Corrections under Rule 60(a) do not affect the underlying judgment and, consistent therewith, do not affect the time for filing a notice of appeal."

The Court of Appeal agreed: "So long as the court's correction was intended to conform the judgment to the original intention of the court, the invocation of Rule 60(a) was proper [citation omitted] . . . '[A] District Court Judge may properly invoke Rule 60(a) to make a judgment reflect the actual intentions and necessary implications of the court's decision." Having so characterized the Court's order, the Court of Appeals concluded, "If the district court properly acted under Rule 60(a), then the correction did not start a new appeal time running." It cited four Court of Appeals cases for the proposition that if

a District Court corrects a judgment under Rule 60(a), the correction does not start a new appeal time running.[4]

In a similar situation, the court in Ray v. United States, 121 F.2d 416 (CA 7th 1941) held that an order amending the judgment on the court's own motion resulted in a "new judgment." On January 18, 1941, judgment was rendered in favor of a beneficiary of a war risk insurance policy and the administratrix of the estate for refund of the premiums paid after reinstatement of the policy. On March 2nd, the judgment was amended on the court's own motion to provide that the beneficiary take nothing and that the administratrix recover the entire amount. The government filed its appeal on June 1, 1941. The administratrix made a motion to dismiss the

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[4] In re Cobb, 750 F.2d 477, 479 (5th Cir 1985); International Controls Corp. v. Vesco, 556 F.2d 665, 670 (2d Cir 1977); United States v. 1,431.80 Acres of Land, 466 F.2d 820, 822 (8th Cir 1972); Scola v. Boat Frances, R., Inc., 618 F.2d 147, 152 n.2 (1st Cir 1980).

appeal on the grounds that it was not timely taken. She contended that the amendment was merely to correct an error arising from an oversight, and did not fundamentally alter the character of the judgment, because it did not change the amount found by the court to be due, but merely provided that the amount should be paid to one person instead of to two. The court stated:

> We do not agree with appellee that the amendment of March 2, constituted merely the correction of a clerical error. The judgment of January 25 was clearly erroneous in ordering payment of the amount of the premiums to the beneficiary and the administratrix of the insured, since only the latter was entitled to recover the amount due, if any. In view of the ruling in Zimmer v. United States 298 U.S. 176, 56 S.Ct. 706, 80 L.Ed. 118, we think there can be no question of the power of the court to correct the judgment, whether such correction was necessitated by a clerical error or one of law. The amended judgment was not entered nunc pro tunc, nor was there any reason why it should have been. We are convinced that it was a new judgment from which time for appeal is to be computed. Hence, the appeal is properly before us, and the motion to dismiss is overruled.

To the same effect, see County of Imperial v. U.S., 348 F.2d 904 (CA 7th 1965), where the court corrected a judgment on its own motion.

In Buggs v. Elgin, Joliet and Eastern Railway Company, 852 F.2d 318 (CA 7th 1988), the court entered an order, almost one year after the judgment, relying alternatively on Rule 60(a) and Rule 60(b), which amended the judgment to correct what it characterized as "oversight". It stated that appropriate relief could be granted under Rule 60(a), but that Rule 60(b) was also applicable because of the mistake or inadvertence on the part of the court.

Bank of California v. Arthur Andersen, 709 F.2d 1174 (CA 7th 1983) held that the fact that an order is called an order correcting or clarifying, rather than

amending or altering the original judgment, is not controlling.[5]

It seems clear that the test as to whether a correction results in a new judgment for which the time to appeal begins running over again has to be a more substantial test than whether the correction or amendment is made under Rule 60(a) or under Rule 60(b).

The Court of Appeals cited the test in Blanton v. Anzalone, 813 F.2d 1574 (9th Cir 1987):

> "The basic distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution' whereas the latter consist of instances where the court changes its mind . . ."

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[5]Rule 60(a) has been utilized by the court to correct damage awards. Aloe Coal Co. v. Clark Equipment Co. 816 F.2d 110 at 117 (3rd Cir 1987) (Cert. Denied 484 US 853, 108S. Ct. 186, 98L.Ed. 111 1987); Barris v. Bob's Drag Chutes 717 F.2d 52 (3rd Cir 1983); Hayden v. Scott Aviation 684 F.2d 270 (3rd Cir 1982).

If rights of appeal rose or fell upon such a distinction, all sorts of mischief could flow from a trial court protecting its record.[6] Blunders in execution can very substantially affect litigants rights, who may not be very good mindreaders.

Obviously, there must be some more definitive manner in which to determine when and whether appeal rights run than the name given an order which changes the judgment.

The courts have struggled with meaningful tests.

In F.T.C. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 205, 73 S.Ct. 245, 97 L.Ed. 245 (1952), this court considered the issue:

> The mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment

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[6]Rule 60(b) deals with more than "clerical mistakes." It also deals with errrors "arising from oversight or omission."

> previously rendered, should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and property settled with finality. (344 US at 211, 73 S.Ct. at 249, footnotes omitted, emphasis added.)

Yet in Bank of California v. Arthur Andersen, supra, the court held that, despite the fact that a "correction" did not resolve an ambiguity, it resulted in an appealable final order [citing Ray]. [id at 1176.]

In Harrell v. Dixon Bay Transportation Company, 718 F 2nd 123, (CA 5th 1983) the court held that the granting of defendant's motion, which set aside a part of the original judgment awarding damages (as happened in the case at bar), resulted in the entry of a new judgment, from which the time for filing a notice of appeal commenced to run anew [citing Ray].[7]

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[7]See also Chavez v. Balesh, 107 F.2d 774 (CA 5th 1983) [$2,000 amendment reopened the judgment on appeal].

In U.S. v. F & M Schaefer Brewing Co, 78 S.Ct. 674, 678; 356 U.S., 227, 232, 2 L.3d 2d 721 (1958), this court held that an opinion is a judgment if it "embodies the essential elements of a judgment for money and truly evidences the judge's intention that it shall be his final act in the case."[8]

The Court of Appeal, in the case at bar, stated that, even if the modification was made under Rule 60(b), the amendment does not open up the original judgment to a new opportunity to appeal because the

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[8]See Union Guardian Trust Company v. Jastromb 47 F.2d 689 (CA 6th 1931) [second judgment "covered exactly the same subject-matter and there could have been no object in entering it unless it was intended to supersede the earlier order"; appeal held timely]. But see Diamond v. McKenzie, 770 F 2d 225 (CA DC 1985), in which the court entered a December 21, 1984 order, which recited "the order shall constitute the final order of the court" and then filed a memorandum opinion reciting the reasons on January 13, 1985; held, time for appeal measured from the date of the memorandum opinion.

modification was favorable to Harper.[9] The same argument was made in the Ray case by appellee, arguing that the judgment was no more onerous to the appellant because it still had to pay the same amount of money. The Ray court held that it makes no difference, because the "correction" was not merely the correction of a clerical error, but actually amended the substance of the judgment. See also Fultz v. Laird, 24 F.2d 172 (CA 6th 1928) [As in the instant case, appellant was better off because of the elimination by amendment of the special damage award; appeal held timely].

We have seen enunciated any number of tests for when a judgment is a new judgment: whether the change is made pursuant to 60(a) or 60(b); whether the change is a change of

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[9]It is not really true that the judgment as modified was favorable. It was unfavorable insofar as it did not go far enough to follow the Court of Appeal's mandate.

"substance"; whether it resolves "a genuine ambiguity"; whether the second order "has disturbed or revised legal rights and obligations"; whether previous legal rights and obligations had been "settled with finality"; whether the change was "material"; whether it was "substantial"; and whether it "truly evidences the judge's intention that it shall be his final act."

The test can be made more bright-line.

It is suggested that the rule should be that a modification constitutes a new judgment if it makes any change in any party's rights. Clerical errors such as misspellings or incorrect recitation of facts or dates, which are not a dispositive part of the order, would not result in a new judgment.[10]

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[10]Illustrative of this distinction is County of Imperial v. U.S., supra. A summary judgment was entered holding that plaintiff's tax liens on property had been extinguished. An amended judgment was later filed which added a second parcel. Then a "second amended judgment" to correct a "clerical error" was filed, which changed a March 8, 1959 date to March 1, 1959. The government

Utilizing this test, the difficult distinctions between whether a change is "substantial", or resolves an "ambiguity", or is in accord with the court's intent, would be eliminated.

This rule might result in a few more cases being reviewed on appeal than now is the case. Such a result isn't likely to impose a burden on the courts, for the corresponding benefit would be the avoiding of piecemeal appellate review of judgments in implementation of the "final decision rule" of 28 USC § 1291[11].

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argued that the "proper judgment" attempted to be appealed from was the first judgment and that the two subsequent judgments "revised it in immaterial ways." The court did not agree as to the first change, which it termed a "material" and a "substantial" one. The court held that the change of date was a change to correct a true clerical error which affected no parties rights, and therefore the time for appeal ran from the first amended judgment.

[11]See Exchange National Bank of Chicago v. Daniels 763 F.2d 286 (CA 7th 1985): "Until the District Court enters a judgment on a 'separate document' within the meaning of F.R.C.P. 58, a party is free to accumulate

Such a rule will serve justice by preventing confusion and deciding cases on their merits. The normal understanding of

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issues. An appeal from a Rule 58 "separate document" at the end of the case brings up the whole case, even if that document was entered long after the opinion or order disposing of the issues the party now seeks to raise on appeal [citations omitted]....Under Rule 58 it is never necessary to file more than one appeal per final judgment....The final decision rule implemented by 28 U.S.C. §1291 makes one appeal per case the norm. The requirement of finality "is the dominant rule in federal appellant practice." [citation omitted] A decree is final "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." See also Osterneck v. Ernst and Whinney, 49 U.S. 169; 109 S.Ct. 987; 301 L.Ed. 2d 146 (1989) [finality requirement of 28 U.S.C. §1291 prevents filing of effective notice of appeal until the District Court has "opportunity to dispose of all motions that seek to amend or alter what otherwise might appear to be a final judgment", which "helps further the important goal of avoiding piecemeal appellant review . . . . The rule we adopt today gives added assurance that an Appellant Court will have the benefit of the District Court's plenary findings with regard to factual and legal issues subsumed in the decision....,as well as other matters of equity bearing upon the merits of the litigation. Such information may well be useful to a complete understanding of the District Court's findings on liability and damages."]

litigants, that they should not appeal until the final form of the judgment is settled, would not be disappointed.

II. THIS COURT SHOULD MAKE IT CLEAR THAT RULE 60(b) IS INDEED A RESERVOIR FOR EQUITABLE RELIEF BY HOLDING THAT A COURT MAY CONSIDER THE MERITS OF A RULE 59 MOTION UNDER RULE 60(b) OR RULE 60(a) WHERE THE REQUIREMENTS OF THESE LATTER RULES ARE MET.

Rule 60(b) give the court broad power to relieve a party or a party's legal representative from a final judgment or order for reasons of "mistake, inadvertence, surprise, or excusable neglect", or "any other reason justifying relief from the operation of the judgment".

Yet, the District Court held that "excusable neglect was not intended to include events which affect only the date a Rule 59(e) motion is filed, as opposed to a more substantive issue.[12]

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[12]The court derived this proposition from Hahn v. Becker 551 F.2d 741, (7th Cir 1977) where the court stated, at 745: [The court] "will not permit the parties to circumvent the service requirement of Rule 59(e) by merely denominating the motion as one made

The Court of Appeal affirmed the trial court, stating "it had no power to extend the time for filing a Rule 59(e) motion."[13]

If this is true, Rule 60(b) must not mean what it says when it states that a court "may relieve a party or a party's legal representative from a final judgment" on the enumerated bases. If Rule 60 means only that the court may so relieve a party of a final judgment if a timely motion to amend the judgment is made, then we don't need Rule 60(b) as it applies to a judgment, because Rule 59 is sufficient. If this is the correct construction, we could have an anomalous situation. If equitable considerations justified setting aside a final judgment, and no motion had been made

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under Rule 60." See also Gribble v. Harris 625 F.2d 1173 (5th Cir 1980) [10 day limitation period for motion to amend judgment is jurisdictional; cannot be extended in the discretion of the District Court].

[13]Citing Scott v. Younger 739 F.2d 1464, 1467 (9th Cir 1984).

under Rule 59, the plain language of Rule 60 would permit it to be set aside. However, if the aggrieved party had first sought relief under Rule 59 but the motion was not filed in time, then the party would be out of luck under Rule 60.

If this is what the framers of the Rule meant, they would have said so.

A number of cases have held that the court can grant a motion to amend a judgment under Rule 60(b)(1) which is untimely under Rule 59(b) provided the grounds for relief comply with the requirements of Rule 60(b).[14]

Courts have held that a motion designated as a Rule 59 motion may be treated

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[14]Sternstein v. "Italia"-Soieta 275 F.2d 502 (2nd Cir 1960); Glick v. White Motors 317 F.Supp. 42 (Eastern Dist. PA 1970); John E. Smith's Sons Co. v. Lattimer Foundry and Machine Co., 239 F.2d 815 at 817 (3rd Cir 1956); Fairway Center Corporation v. U.I.P. Corp. 491 F.2d 1092 (8th Cir 1974); Crawford v. West India Carriers 56 F.R.D. 32 (Dist. Ct., S.D. Fl, 1972); Strandley v. Cortez 518 F.2d 488 at 493 (3rd Cir 1975); Federal Deposit Insurance Corp. v. Alker 234 F.2d 113 (3rd Cir).

as a motion under Rule 60 if the relief sought is available under Rule 60.[15] They have held that the court can modify a judgment on its own motion under Rule 60.[16]

None of these decisions are Supreme Court decisions. However, this court held, in Thompson v. I.N.S, 375 U.S. 386; 84 S.Ct. 397; 11 L.Ed. 2d 404 (1984) that the courts do have the power to excuse the untimely filing of a Rule 59(e) motion in cases of "unique circumstances" so that the appeal "may be heard on the merits."

This court should reconcile these disparate authorities.

It seems that some courts have used insubstantial and semantic rationales for clearing their calendars and avoiding the more difficult task of hearing an appeal on

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[15]Vaughter v. Eastern Airlines 817 F.2d 685 (11th Cir 1987); In re Frigitemp Corp. 781 F.2d 324 (2nd Cir 1986).

[16]McDonnell v. Celebrezze 310 F.2d 43, at 44 (5th Cir 1962); Frederick v. Mobil Oil 765 F.2d 442 (5th Cir 1985).

the merits. For example, in this case, the Court of Appeal, while ostensibly reviewing an appeal from the denial of Rule 60(b) relief for an abuse of discretion, held that the District Court did not abuse its discretion in denying the requested relief because "it had no power to extend the time for filing a Rule 59(e) motion." By so holding, the court did not review the merits of the asserted excusable neglect. Scott v. Younger, supra, Gribble v. Harris, United States v. Hall, and Hahn v. Becker, supra, all utilized the same rationale -- thereby emasculating Rule 60.

In the Court of Appeal's ORDER DENYING PETITIONER'S REQUEST FOR REHEARING, the Court stated that it "is satisfied that the District Court did not abuse its discretion in denying appellant's Rule 60(b) motion." The Court did not exercise any discretion; it held it had no power to do so.

Rule 60(b)(6) has been described as a "reservoir of equitable powers to do justice in a particular case."[17]

This court should resolve the apparent conflict between Rule 59 and Rule 60. A court need not explicitly extend the time limit for hearing a Rule 59(e) motion in order to consider the motion under Rule 60, but in doing so, it is indeed excusing the failure to file the Rule 59 motion in time. That is what Rule 60 is all about.

III CONCLUSION

Appellant is entitled to know what the judgment is before the appeal. Defendant asked the court to reverse the punitive damage award[18]. Defendant also raised the

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[17]McDonald v. Celebrezze, supra. See discussion in 7 Moore Federal Practice, Paragraph 60.27(2). See also Klapprott v US 335 (US 601 69 S.Ct.) 384, 93 L.Ed. 266 (1949); Mayberry v. Maroney 529 F.2d 332 at 335 (3rd Cir 1976).

[18]California law holds that evidence of the wealth of defendant is an absolute prerequisite, and failure of the defendant to introduce evidence concerning the issue

failure to apply the correct measure of damages. Because the District Court had failed to address these issues, just as it failed to follow this court's mandate to proportionately reduce the punitive damage awards, it was not unreasonable for defendant to think that the trial court might have failed to consider them "from oversight or omission" [Rule 60(a)], and therefore might correct the judgment on these points also. Defendant was entitled to settle what the court really intended to be its judgment.

Despite Rule 58, the uncertainty sought to be avoided is present in this case. There is an ambiguity as to when, or whether, the judgment was entered.

Where that is the case, any doubt should be resolved in favor of the litigant. Where there is an ambiguity which has not been eliminated, the court should allow the appeal

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mandates reversal of a punitive damage award. See Adams v. Murakami, 554 Cal.3d 105 (1991).

to go forward. The policy of time limitations for appeal is not for the benefit of the opposing party. It is for the benefit of the court, to prevent stale appeals. Where there is an ambiguity, consideration of an appeal on the merits does no harm and prejudices no one, and does justice by reaching the merits. Harm is done when ambiguous situations arise and the rights of litigants are cut off as a result. In those circumstances, relief should be given to the person suffering the least detriment. The law is against a forfeiture of rights under such circumstances, and should not cut off substantive rights of appeal simply by nature of a process which sometimes begets ambiguous situations. The ultimate policy is to avoid exactly what occurred in this case. Clearly, there is still a gap in the Federal Rules that can create some uncertainty to a reasonable person. Under these circumstances, the policy should be to

preserve the litigant's rights; not to cut them off.

Mr. Matthews, appellant's counsel, made a human error, under trying and emotional circumstances, which is certainly "excusable" under any system of justice.[19] When he realized his mistake, it was reasonable for him to petition the court to correct what he knew to be errors which the court would not have intended. No constructive purpose would

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[19]This Court in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership 113 S.CT 1489; 123 L.Ed 2d 74 (1993), held that an attorney's inadvertent failure to file a proof of claim in bankruptcy by the bar date can constitute "excusable neglect" within the meaning of Rule 9006(b)(1). The Court stated "the determination of what sorts of neglect will be considered excusable is an equitable one, taking into account all relevant circumstances." These circumstances were held not limited to those caused by intervening circumstances beyond the party's control. The Court stated that this conclusion was supported by the fact that the phrase "excusable neglect" as used in the Federal Rules of Civil Procedure is understood to be a "elastic concept" and has been construed to include inadvertent delays and negligence. The court also cited as relevant questions of prejudice to the debtor or to court administration from a late filing.

have been served for Mr. Matthews to have taken these issues up on appeal, when he was confident that the court had made errors which it would correct. Once done, the record on appeal was clear and unencumbered by a needless issue.

These rules should be construed in accordance with their purpose to seek sensible and reasonable results. They are not intended to be used to give litigators an advantage over the other or to reduce the court's calendar and avoid hearings on the merits.

Defendant should not be deprived of her rights of appeal based upon a fiction that the judgment was not amended. The District Court did not term its change a "clerical" mistake. The court cited that portion of the rule that permits correction of errors "arising from oversight or omission." It rendered a new judgment. (See Ray supra.)

A litigant ought not to have to guess when an appeal should be taken when she knows that the judgment is clearly erroneous and requires amendment.

This court should hold that a new judgment is the ~~judgment~~.

DATED:

BY _____
JAMES F. MATTHEWS,
Counsel of Record
for Petitioner

APPENDIX

EXHIBITS:

"A" AMENDED JUDGMENT AFTER REMAND filed February 27, 1992 in the United States District Court Northern District of California.

"B" ORDER CORRECTING JUDGMENT ENTERED 02/27/92; DENYING MOTION FOR RELIEF FROM JUDGMENT; DENYING MOTION TO AMEND JUDGMENT filed on May 18, 1992.

"C" NOTICE OF APPEAL filed June 17, 1992.

"D" OPINION of United States Court of Appeals for the Ninth Circuit filed November 1, 1993.

"E" ORDER of the United States Court of Appeals for the Ninth Circuit filed February 28, 1994.

"F" DECLARATION OF JAMES F. MATTHEWS IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT filed April 14, 1992 in the United States District Court Northern District of California.

EXHIBIT "A"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

R. DEAN HARMAN, LYNN HARMAN (aka LYNN MEID)	CASE NO. 84-20377-SW
Plaintiffs,	AMENDED JUDGMENT AFTER REMAND
v.	
EVA HARPER, BRAINARD HARPER, HARPER REALTY INC., A California Corporation, et al.,	Filed Feb 27,1992
Defendants.	

The above-entitled case came before the court on remand from the Ninth Circuit for reconsideration of the damages originally awarded by the district court, SPENCER WILLIAMS, United States District Judge, presiding.

Pursuant to the Order Awarding Damages filed herein on January 14, 1992, the findings of fact, and good cause appearing thereof, the court now makes its judgment as follows:

1. That Plaintiff LYNN MEID HARMAN recover the sum of $33,737.80 plus interest at 10% per annum, from March 7, 1983 to July 25, 1986 in the amount of $11,420.64 against Defendant EVA HARPER for total damages of $45,158.44 in transaction #2 known as the "Joint Venture."

2. That Plaintiff R. DEAN HARMAN recover the sum of $5,792.00 plus interest at 10% per annum from January 19, 1982 to July 25, 1986 in the amount of $3,199.08 and foreclosure costs of $1,783.00 against Defendant EVA HARPER for total damages of $10,774.08 in transaction #3 known as "Andreini Note."

3. That Plaintiff R. DEAN HARMAN recover the sum of $10,300.00 plus interest at 10% per annum from May 14, 1982 to July 25, 1986 in the amount of $5,262.12 against Defendant EVA HARPER for total damages of $15,562.12 in transaction #4 known as "CARELLA EQUITY SHARE."

4. That Plaintiff LYNN MEID HARMAN recover punitive damages against EVA HARPER in the sum of $100,000.00.

5. That Plaintiff R. DEAN HARMAN recover punitive damages against EVA HARPER in the sum of $28,732.54.

6. Plaintiff's LYNN MEID HARMAN and R. DEAN HARMAN shall recover costs from Defendant EVA HARPER in the sum of $3,660.09 as taxed in their favor on September 4, 1986.

7. This Amended Judgment shall bear interest at the rate of 10% per annum from July 25, 1986 until paid in full.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: FEB 26 1992

/s/SPENCER WILLIAMS
SPENCER WILLIAMS,
U.S. DISTRICT COURT JUDGE

EXHIBIT "B"

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

R. DEAN HARMAN and LYNN HARMAN,	CIV. NO. 84-20377-SW
Plaintiffs,	ORDER CORRECTING JUDGMENT ENTERED 02/27/92; DENYING MOTION FOR RELIEF FROM JUDGMENT; DENYING MOTION TO AMEND JUDGMENT
v.	
EVA HARPER, et al.,	
Defendants.	Filed May 18,1992

Defendant's Motion for Relief From Default and Motion for Amendment of Judgment came before the Court for oral argument on May 13, 1992. Due to an oversight on the part of the Court, the punitive damage award to Lynn Harman was not reduced to reflect the decrease in out-of-pocket damages awarded for transactions 1 and 2. Federal Rule of Civil Procedure 60(a) provides that errors "arising from oversight or omission may be corrected by the court at any time of its own initiative . . . ." Accordingly, the Clerk of Court is hereby instructed to correct the

judgment entered on February 27, 1992 awarding $100,000 in punitive damages to Lynn Harman $100,000. The punitive damage award to Lynn Harman shall now be entered as $63,221.82.

In bringing these motions, Defendant asks the Court to reverse all awards of punitive damages and to reconsider the damages awarded for transactions 2 and 4. On March 16, 1992, defense counsel filed a Rule 59(e) motion to amend the judgment. That motion was filed four days after the ten-day period for filing such motions expired. According to defense counsel, the sudden death of his father-in-law in Colorado caused the delay. Although the Court does empathize with counsel, the Court has no authority to extend the time in which a party may move to amend the judgment under Rule 59(e). See Gribble v. Harris, 625 F.2d 1173 (5th Cir. 1980) (ten-day limitation period for serving motion for new trial or to amend the judgment is a jurisdictional issue which cannot be

extended in the discretion of the District Court); United States v. Hall, 463 F.Supp. 787, 791 (1983).

In an attempt to circumvent the law, defense counsel has recaptioned the same requests as a Rule 60(b) motion. Rule 60(b)(1) authorizes the Court to relieve a party from a final judgment for reasons of excusable neglect. However, the Court does not think "excusable neglect" under Rule 60(b)(1) was intended to include events which affect only the date a Rule 59(e) motion is filed, as opposed to a more substantive issue. If the term "excusable neglect" was interpreted to include events which cause a party to file its Rule 59(e) motion late, the law absolutely prohibiting the district courts from extending the 10-day period would be stripped of much of its potency. As stated in Hahn v. Becker, the Court "will not permit the parties to circumvent the service requirement of Rule 59(e) by merely

denominating the motion as one made under Rule 60." 551 F.2d 741, 745 (7th Cir. 1977).

Even if the Court were to consider Defendant's motion, they would be denied. The Court's Order Awarding Damages on remand was filed on January 14, 1992. A copy of the proposed judgment was then sent to defense counsel, and the Court delayed filing the judgment for nearly four weeks in order to give counsel an opportunity to object. Despite the long delays, defense counsel did not timely file his Rule 59(e) motion to amend the judgment. Given the Court's limited resources, it cannot act where the parties have not requested it to do so in a timely manner.

Moreover, the relief requested by Defendant is outside of the Court's sphere on remand. The Ninth Circuit remanded this case with narrow instructions to recalculate the damages, both general and punitive, under the proper standards. The Ninth Circuit did not remand for a new trial to determine the

propriety of awarding any damages at all. This Court is limited to act in accordance with those instructions. For all these reasons, Defendant's motions for relief from default and for amendment of judgment are DENIED.

IT IS SO ORDERED.

DATED: 5/15/92 /s/SPENCER WILLIAMS
U.S. DISTRICT COURT JUDGE

EXHIBIT "C"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

R. DEAN HARMAN and LYNN HARMAN, Plaintiffs, v. EVA HARPER, et al., Defendants.	No. 84020377-SW NOTICE OF APPEAL

Notice is hereby given that EVA HARPER, Defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 18th day of May, 1992, and from the ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND DENYING MOTION TO AMEND JUDGMENT entered the same date.

Dated: June 17, 1992 MATTHEWS, BOEHM & HAMMON

By: /s/JAMES F. MATTHEWS
JAMES F. MATTHEWS
Attorneys for Defendant
Eva Harper

EXHIBIT D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. DEAN HARMAN,
Plaintiff-Appellee,

v.

EVA HARPER,
Defendant-Appellant.

No. 92-16156
D.C. No.
CV-84-20377-SW
OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer M. Williams, District Judge, Presiding

Submitted October 19, 1993*
San Francisco, California

Filed November 1, 1993

Before: Procter Hug, Jr., Mary M. Schroeder, and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

SUMMARY

Civil Litigation and Procedure/Appeals

The court of appeals affirmed in part a district court order. The court held that a district court's modification of a damages award on its own motion did not start anew the time period during which the defendant could file appeals from the

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

judgment, when the modification was favorable to that defendant.

Appellee R. Harman and Lynn Harman sued appellant Eva Harper, Brainard Harper, and Harper Realty, Inc., alleging violations of securities laws and torts. The district court awarded the plaintiffs judgment for compensatory and punitive damages. The court of appeals affirmed in part, reversed in part, and remanded for a recalculation of damages. The district court recalculated damages, and entered judgment against Eva Harper on February 27, 1992.

Eva Harper filed a Rule 59(e) motion for a new trial or amendment of judgment after the ten-day period for filing the motion had expired. The district court denied the motion as untimely. No notice of appeal was filed within the time permitted for appeal from the February 27, 1992 judgment.

On May 18, 1992, the district court, on its own motion under Rule 60(a), ordered its earlier judgment to be corrected due to the court's oversight in calculating the punitive damages award to one plaintiff.

Eva Harper filed a notice of appeal from the May 18, 1992 "final judgment." She contended that the merits of the entire judgment were properly appealable, and that the court's modification of the remand judgment went beyond the correction of a ministerial mistake, and consequently could not be a Rule 60(a) correction. Harman moved to dismiss the appeal as untimely.

[1] Harper's appeal must fail. If the district court properly acted under Rule 60(a) in modifying the judgment, then the correction did not start a new appeal time running. Therefore, Harper's appeal of the original remand judgment would be untimely. [2] If the district court's modification of the original remand judgment went beyond the limits of Rule 60(a), it would amount to a grant of Rule 60(b) relief. Because the dis-

trict court's modification only reduced the punitive damages award against Harper, such an amendment could not possibly subject the entire original judgment to a new opportunity for Harper to appeal. [3] Harper's attempt to appeal the underlying remand judgment accordingly fails.

COUNSEL

James F. Matthews, Matthews, Boehm & Hammon, San Jose, California, for the defendant-appellant.

Diana E. Hoffman, John Kazubowski, Hoffman & Kazubowski, San Jose, California, for the plaintiff-appellee.

OPINION

CANBY, Circuit Judge:

Defendant Eva Harper appeals an order of the district court correcting an earlier judgment and denying Rule 60(b) relief from that judgment. Insofar as Harper's appeal challenges the earlier judgment, entered after remand from this court, we dismiss the appeal. To the extent that the judgment challenges the denial of Rule 60(b) relief, we affirm.

FACTS

This action was originally brought by Dean and Lynn Harman against Eva and Brainard Harper, and Harper Realty, Inc. The complaint alleged violations of state and federal securities laws, as well as state-law torts of fraud and misrepresentation. After a bench trial, the district court awarded plaintiffs judgment for compensatory and punitive damages on several counts, along with attorneys' fees. On appeal, we affirmed in part, reversed in part, and remanded for a recalculation of

damages. *Harman v. Harper*, No. 86-2916 (9th Cir. Aug. 21, 1990)(amended memorandum). The only claims that survived for purposes of remand were state-law claims against Eva Harper.

On remand, the district court recalculated damages and entered judgment against Eva Harper on February 27, 1992. On March 16, 1992, Eva Harper filed a Rule 59(e) motion for new trial or amendment of judgment. That motion was filed four days after the expiration of the ten-day period specified by Rule 59 for the filing of such a motion; the district court denied it as untimely. No notice of appeal had been filed at that time, nor was any notice filed within the time permitted for appeal from the judgment entered on February 27, 1992.

On May 18, 1992, Eva Harper filed a motion under Rule 60(b) seeking the same relief sought in her untimely Rule 59(e) motion. Her counsel argued that he should be forgiven his untimeliness in bringing the prior motion because of the death of his father-in-law. The district court denied relief, stating that it had no power to extend the 10-day period for bringing a Rule 59(e) motion, and that it would not permit a Rule 60(b) motion to be used to revive or do service for a Rule 59(e) motion.

On its own motion, however, the district court ordered its earlier judgment to be corrected. The court stated that, "due to an oversight on the part of the Court," the punitive damage award to one of the plaintiffs had not been reduced to reflect a reduction in the compensatory damages on remand. The court, stating that it acted to correct an oversight pursuant to Rule 60(a), ordered the clerk to correct the earlier judgment by reducing an award of $100,000 punitive damages to $63,221.82, thereby maintaining proportionality between the compensatory and punitive awards.

On June 17, 1992, Eva Harper filed a notice of appeal from

"the final judgment entered" on May 18, 1992,[1] and from the denial of Rule 60(b) relief on that same date.

The Harmans moved to dismiss the appeal as untimely. A motions panel referred that motion to this panel, and briefing on the merits was completed. Eva Harper has filed briefs challenging the award of damages against her on remand; she contends that the merits of the entire judgment are properly appealable pursuant to her notice of appeal of June 17, 1992. We disagree.

APPEAL FROM THE JUDGMENT

The district court stated that it was correcting its judgment pursuant to Fed. R. Civ. P. 60(a). So long as the court's correction was intended to conform the judgment to the original intention of the court, the invocation of Rule 60(a) was proper. *See Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1445 (9th Cir. 1990) (court may amend order canceling trademark to add two additional trademarks; "[a] district court judge may properly invoke Rule 60(a) to make a judgment reflect the actual intentions and necessary implications of the court's decision."); *Jones & Guerrero Co., Inc. v. Sealift Pacific*, 650 F.2d 1072 (9th Cir. 1981) (district court properly invoked Rule 60(a) to amend order dismissing case against Guerrero since it never intended to do so; Rule 60(b) inapplicable). *See also Blanton v. Anzalone*, 813 F.2d 1574, 1577 n. 3 (9th Cir. 1987) (invoking Rule 60(a) to delete an award of prejudgment interest):

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[1]In fact, no corrected judgment had been entered; only the court's correction order had been filed. That fact does not affect the validity of this appeal, however. "[A]n order amending a final judgment is an appealable final order. . . ." *Bank of California v. Arthur Andersen & Co.*, 709 F.2d 1174, 1176 (7th Cir. 1983); *see also Shay v. Agricultural Stabilization and Conservation State Committee for Arizona*, 299 F.2d 516, 524 (9th Cir. 1962) (order denying Rule 60(b) motion is appealable).

> The basic distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution' whereas the latter consist of instances where the court changes its mind. . . .

[1] Harper contends that the court's modification went beyond the mere correction of a ministerial mistake, and consequently cannot be a Rule 60(a) correction. We need not decide that question, however, for Harper's appeal must fail either way. If the district court properly acted under Rule 60(a), then the correction did not start a new appeal time running. *See In re Cobb*, 750 F.2d 477, 479 (5th Cir. 1985) ("Corrections under Rule 60(a) do not affect the underlying judgment, and, consistent therewith, do not affect the time for filing a notice of appeal.") (citation omitted); *see also International Controls Corp. v. Vesco*, 556 F.2d 665, 670 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (same); *United States v. 1,431.80 Acres of Land*, 466 F.2d 820, 822 (8th Cir. 1972) (same); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 152 n.2 (1st Cir. 1980)(same). The time for Harper to appeal the original remand judgment therefore expired 30 days after entry of the original remand judgment on February 27, 1992. Fed. R. App. P. 4(a)(1). Harper's appeal of the original remand judgment is therefore untimely.

[2] If, on the other hand, the district court's modification of the original remand judgment went beyond the limits of Rule 60(a), it would amount to a grant of Rule 60(b) relief. *See Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 645 (9th Cir. 1984) ("error regarding the legal effect of [stipulated judgment] was one of law and therefore [could] be corrected only under Rule 60(b)"). In that event, Harper is no better off. The only modification that the district court made to its earlier judgment was favorable to Harper; it reduced the punitive damages award against her. That amendment cannot possibly subject the entire original judgment to a new opportunity for Harper to appeal.

> [Statutes that limit appellate jurisdiction to review within a prescribed period] are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered *which is of no import to the matters to be dealt with on review.*

Federal Trade Comm'n v. Minneapolis-Honeywell Co., 344 U.S. 206, 213 (1952) (emphasis added); *see also Buggs v. Elgin, Joliet & Eastern Ry. Co.*, 852 F.2d 318, 323 (7th Cir. 1988) (Rule 60(b) amendment does not open original judgment to new appeal when the amendment creates no new incentive to appeal original judgment). The only issue presented by Harper's appeal from the court's amending order is the validity of the amendment itself. *See Buggs*, 852 F.2d at 323.

Harper does not attack, of course, the district court's exercise of discretion in correcting the judgment to Harper's advantage. Instead, she attempts to attack the underlying judgment, which is not the subject of this appeal from the grant of Rule 60(b) relief.

[3] Harper's attempt to appeal the underlying remand judgment accordingly fails, whether the district court modified its judgment pursuant to Rule 60(a) or Rule 60(b). Insofar as her appeal attacks the underlying judgment, it is dismissed.

APPEAL FROM DENIAL OF RULE 60(b) RELIEF

Harper's notice of appeal indicated that she appealed in part from the denial of her motion for Rule 60(b) relief. We review an appeal from the denial of Rule 60(b) relief for an abuse of discretion in denying the motion; the appeal does not bring the entire underlying judgment up for review. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 n. 7 (1978); *Feister v. Turner*, 783 F.2d 1474, 1476 (9th Cir. 1986).

EXHIBIT "E"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. DEAN HARMAN,	)	
	)	
Plaintiff-Appellee.	)	CA No. 92-16156 DC No. CV-84-20377-SW
	)	
v.	)	O R D E R
	)	
EVA HARPER,	)	
	)	
Defendant-Appellant.	)	Filed Feb 28,1994
	)	

BEFORE: HUG, SCHROEDER, and CANBY, Circuit Judges

Having reviewed all of the papers and records on appeal, the court is satisfied that the district court did not abuse its discretion in denying appellant's Rule 60(b) motion. The petition for rehearing is denied.

EXHIBIT "F"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

R. DEAN HARMAN and LYNN HARMAN,	No. C-84020377-SW
Plaintiffs,	DECLARATION OF JAMES F. MATTHEWS IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT
v.	
EVA HARPER, et al.,	
Defendants.	Date: May 13, 1992 Time: 10:00AM Dept: The Honorable Spencer Williams

I, James F. Matthews, declare:

I am an attorney at law licensed to practice in all courts of the State of California and in the Federal District Court, Northern District of California. I make this declaration in support of defendants' motion for relief from default. I know of the things stated herein of my own knowledge, and if sworn, could testify competently thereto.

The judgment was entered herein on February 27, 1992. Therefore, pursuant to Rule 59, defendants' motion for new trial or

motion for amendment of judgment was required to be filed within ten days. Under Rule 6, intermediate Saturdays and Sundays are not counted because the time is under eleven days. Therefore, the motion was required to be filed by Thursday, March 12th.

On Friday, March 6, 1992, because I had not yet had a chance to prepare the motion, I took the file home with me with the plan to dictate the motion on Sunday, March 8, 1992.

On Saturday night, March 7, 1992, my father-in-law in Colorado Springs passed away. My wife and I flew out to Colorado Springs the next morning, Sunday, March 8, 1992. In the flurry of preparation for the trip, I did not have time to consider my law business. I left the file behind that I had taken home for the weekend.

My return trip ticket was purchased for the following Wednesday, March 11th. However, because of the dire circumstances of my wife's mother and the urgency and complexity of her affairs in Colorado

Springs, I was unable to return until Saturday, March 14, 1992. During my stay there, I was unable to attend to my law business. The motion was prepared and served the following Monday, March 16, 1992.

On Sunday, when I left, I called my secretary to inform her that I had to leave for Colorado Springs, and that I would be back on Wednesday. I asked her to check my calendar and let me know of any deadlines. Because of the flurry of activity in Colorado Springs, I did not get back to my secretary to tell her that I was not arriving on Wednesday. My best recollection is that I did not talk to her until Thursday afternoon, March 12th. Either that afternoon or on Friday, March 13, I asked her to check the Harper file for the deadline, which I had forgotten. She phoned me back to tell me that she had been unable to find the file (it was in my brief case).

It was inadvertence and mistake that I did not have the presence of mind to take the

file with me when I left or instruct my secretary to take appropriate action. However, my father-in-law's death was unexpected, and the atmosphere was very emotional, and under those circumstances, I believe that the neglect was excusable neglect.

I did not file a motion for relief under Rule 60 in conjunction with the motion I prepared and filed on March 16th for new trial or amendment of the judgment (Rule 59), because, in the rush to prepare the motion that day, my mistake and inadvertence, I counted the days from the day of Notice rather than from the day of entry of judgment.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was executed in San Jose, California on this 13th day of April, 1992.

Dated: June 17, 1992

By: /s/JAMES F. MATTHEWS
JAMES F. MATTHEWS